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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re GRANT O., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. GRANT O., Defendant and Appellant.	F044271 (Super. Ct. No. JW101358-00) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County, Jon E. Stuebbe, Judge.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Lloyd G. Carter and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Harris, A.P.J., Cornell, J., Gomes, J.

On August 13, 2003, a petition was filed pursuant to Welfare and Institutions Code, section 602 against appellant, Grant O., alleging that he committed two acts of lewd and lascivious conduct with a child under age 14 (Pen. Code, § 288, subd. (a), counts one & three) and committed an act of oral copulation with a person under age 18 (Pen. Code, § 288a, subd. (b)(1), count two).[1] On October 6, 2003, Grant admitted count two. Counts one and three were dismissed subject to a *Harvey* waiver.[2] At the conclusion of the disposition hearing, the juvenile court committed Grant to the California Youth Authority (CYA) for three years. Grant was ordered to register as a sex offender and was awarded applicable custody credits. On appeal, Grant contends the juvenile court abused its discretion in committing him to CYA.

FACTS

According to the probation report, on March 11, 2003, two Mormon youth leaders told deputies that Grant's older sister informed them that their mother was exploiting her children by having them pose for a web camera while the mother sexually touched herself.[3] The older sister reported that her father was sexually molesting her and two younger sisters. The youth leaders reported that Grant had been disciplined by the church for touching his younger sister B. O. in a sexual manner. B. O. told deputies she had been molested by Grant.

Grant admitted to the probation officer that he had "done stuff" with his sisters. Grant said he played doctor with them and touched their vaginas when they were younger, but not since he was 12. Grant asserted that he never did things with his sisters that they did not want to do.

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1 The victim in counts one and two was S. S. The victim in count three was one of appellant's younger sisters, B.O.

2 *People v. Harvey* (1979) 25 Cal.3d 754.

3 The facts are derived from the probation report.

On March 13, 2003, deputies of the Kern County Sheriff's Department obtained a search warrant for Grant's residence. Grant's older sister telephoned authorities to report that her younger sister had seen Grant being orally copulated by 12-yr-old S.S. two months earlier. S.S. confirmed the report. When interrogated by deputies, Grant admitted that S.S. orally copulated him. Grant thought S.S. was 15 years old.

DISPOSITION HEARING

Grant told the probation officer that he was young, stupid, and made mistakes. Grant did not believe he needed counseling and did not see himself as a sexual offender. Grant denied having sex with his sister B.O., but admitted having sexual intercourse when he was younger with his sister F.O. Grant told the probation officer that he was not going to court based on molestation of F.O. and that what he did with F.O. did not matter. Grant successfully completed the probation department's prevention program in September 2001 for a referral from the Sheriff's Department for a petty theft in February 2000.

Grant's parents signed a waiver of reunification services. Grant's three sisters wished to be adopted by their current caretakers.[4]

Grant's father told the probation officer that Grant follows curfew, goes to church, does not use drugs, and graduated from high school.[5] If Grant had not been locked up, he would have become an Eagle Scout.

The probation officer noted Grant was diagnosed with ADHD at age eight. Grant was a member of the Boy Scouts and denied any gang affiliation. Grant does not use drugs or alcohol, but admitted experimenting once with marijuana four years ago. Grant

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[4] According to the probation report, an evaluation was conducted pursuant to Welfare and Institutions Code, section 241.1.

[5] Grant turned 18 prior to the disposition hearing.

was a special education student in high school with an IEP and was in RSP/Special Education classes.

The probation officer noted that despite Grant's admission of count two, he was unwilling to accept responsibility for his actions or to recognize the impact his conduct had on the victims. Grant saw himself as the passive participant of sexual advances by the victim S.S. The probation officer described Grant's conduct toward his younger sister as "disturbing" but noted that Grant attributed his conduct to raging hormones. Though Grant admitted sexual intercourse with his younger sister F.O., he made it clear that he was not being prosecuted for that conduct because it happened a long time ago.

The probation officer found that Grant was developing a pattern of sexual molestation which had not been addressed or deterred. Grant appeared dumbfounded concerning the need for counseling as a sex offender. The probation officer concluded that Grant failed to exhibit any moral responsibility for his conduct and showed no motivation for therapeutic treatment for his misconduct. The probation officer believed Grant presented a serious risk to the community as a sexual predator if he was left untreated.

Given these facts and Grant's age, the probation officer believed group home placement was inappropriate and that it was imperative Grant receive intense and regular counseling. The probation department did not have a program equipped to deal with Grant's problems and outpatient therapy would be inappropriate.[6] Local commitment to Camp Erwin Owen or the Kern Crossroads Facility would not adequately address Grant's

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[6] A letter from a supervisor with the County of Kern Mental Health System of Care attached to the probation report stated that adult offenders could attend a program "of weekly group and individual therapy." To be amenable for such services, however, the offender "must admit to and take responsibility for his/her offense."

A letter from the health care provider of Grant's father's employer stated that Grant was eligible for mental health benefits.

need for rehabilitation or the need for community protection. The probation officer recommended commitment to CYA.

Dr. Eugene T. Couture, a clinical neuropsychologist, evaluated Grant prior to the disposition hearing. Dr. Couture tested Grant's IQ at 96, which falls in the average range. Grant told Dr. Couture he had three or four girlfriends his own age and engaged in heavy petting with them. Grant denied having genital or oral sex with his girlfriends. Dr. Couture found Grant naïve and relatively inexperienced for an 18 year old. Grant believed S.S. was 15, that she wanted to have oral sex with him, and he agreed to do so. Grant was remorseful about the sexual interaction he had with his sister. Grant believed he was only experimenting with her and that the inappropriate conduct had happened years ago.

Dr. Couture described Grant as cooperative and forthcoming. Grant had a developmental learning disorder causing him to read at only a fourth grade level and suffered from ADHD. Dr. Couture did not test Grant for paraphilia because he did not find that Grant displayed any specific sexual dysfunction. Dr. Couture stated that Grant did not display pedophilia because he was not aroused by children and had age appropriate girlfriends. Even Grant's sexual interaction with S.S. was with someone Grant believed to be 15 years old, only two years younger than he was at the time of the offense. Dr. Couture opined that Grant did not require prolonged treatment because he did not display a sexual arousal disorder.

Dr. Couture concluded that a commitment to CYA would be inappropriate in Grant's case. Dr. Couture agreed that CYA had good programming for treating people with sexual arousal disorders such as pedophilia, but that CYA did not have programming to provide "appropriate heterosocial training in cases of young people who have normal arousal patterns." Dr. Couture recommended Grant be placed in a local program such as the Kern County Mental Health System of Care, Forensics Unit.

The disposition hearing was held on October 6, 2003. Grant's counsel argued that Grant should not be committed to CYA because he had no serious juvenile record and Grant believed the victim S.S. was 15. Defense counsel characterized Grant's sexual contact with his sisters more as juvenile curiosity than predatory behavior that presented a danger to society. Counsel observed that Grant's home environment presented disturbing behavior from parents and an older brother that had been happening for years. Grant did not have the behavioral guidelines found in the typical family. Counsel believed that Grant needed education concerning the parameters of appropriate sexual behavior and that he be permitted to receive counseling through the Mental Health System of Care according to the recommendation of Dr. Couture.

Both the probation officer and prosecutor argued that Grant needed counseling, but in a secure facility where his behavior could be controlled. The probation officer was particularly concerned that Grant tended to minimalize his conduct.

The juvenile court noted it had spent considerable time reading through all of the documentation, including reading Dr. Couture's report in detail. The court described Grant's perception as a blind spot; "an area of his life that is completely out of focus." The court believed this was, in part, due to the family dynamics which had gone on over a span of years. The court stated that Grant's "blind spot" had continued for a long time since he was 10 or 11 years old.

The court was concerned that Grant did not clearly understand his conduct was wrong. The court wanted an appropriate response that protected the community and at the same time provided Grant with treatment. The court noted that local facilities such as Camp Irwin Owen and the Crossroads did not have the counseling opportunities that Grant required. The court understood Dr. Couture's report and believed it was reasonable given the way Dr. Couture analyzed the facts. The court did not want to argue with Dr. Couture's diagnosis.

To help Grant learn how to establish appropriate boundaries and to protect the community, however, the court ordered Grant's commitment to CYA for a maximum term of confinement of three years. The court found Grant's offense to be a felony and that Grant was a person with exceptional educational needs.

CYA COMMITMENT

Grant argues his offense must be viewed in the context of his troubled family and the absence of a significant juvenile history. Given the psychological evaluation by Dr. Couture, Grant contends the juvenile court abused its discretion in committing him to CYA.

It is clear that a commitment to CYA may be made in the first instance, without previous resort to less restrictive alternatives. (*In re Asean D*. (1993) 14 Cal.App.4th 467, 473; *In re Tyrone O*. (1989) 209 Cal.App.3d 145, 151.) The gravity of an offense, coupled with other relevant factors, is always a consideration. (*In re Samuel B*. (1986) 184 Cal.App.3d 1100, 1104 [disapproved on another ground in *People v*. *Hernandez* (1988) 46 Cal.3d 194, 205-206].)

It is error for a juvenile court to fail to consider less restrictive alternatives to CYA commitment. (*In re Teofilio A*. (1989) 210 Cal.App.3d 571.) In *Teofilio A*., neither the juvenile court nor the probation report considered alternatives to CYA commitment. Though the only evidence in the record showed the juvenile was an unsuitable candidate for CYA, the court in *Teofilio A*. proceeded to commit the juvenile to CYA.

Here, in contrast to *Teofilio A*., the probation officer's report and the juvenile court were expressly aware of local placement alternatives to CYA.

The probation officer noted that despite Grant's admission of count two, he was unwilling to accept responsibility for his actions or to recognize the impact his conduct had on the victims. Grant saw himself as the passive participant of sexual advances by the victim S.S. The probation officer described Grant's conduct toward his younger sister as "disturbing" but noted that Grant attributed his conduct to raging hormones.

Though Grant admitted sexual intercourse with another of his younger sisters, he said he was not being prosecuted for that conduct because it happened a long time ago.

The probation officer found that Grant was developing a pattern of sexual molestation, which had not been addressed or deterred. Grant appeared dumbfounded concerning the need for counseling as a sex offender. The probation officer concluded that Grant failed to exhibit any moral responsibility for his conduct and showed no motivation for therapeutic treatment for his misconduct. The probation officer believed Grant presented a serious risk to the community if he was left untreated.

Given these facts and Grant's age, the probation officer believed group home placement was inappropriate and that it was imperative Grant receive intense and regular counseling. The probation department did not have a program equipped to deal with Grant's problems and outpatient therapy would be inappropriate.

The juvenile court admitted that it struggled to determine the best disposition for Grant. Though the court did not want to challenge Dr. Couture's diagnosis, the court found that Grant was acting with a blind spot that made it very difficult for him to understand why his conduct was wrong. The court further found that Grant was a danger to the community. The court's finding is factually supported by a record revealing that Grant was molesting two of his younger sisters for years. S.S. was only 12 years old when Grant had her orally copulate him.

Though the juvenile court did not want to challenge Dr. Couture's diagnosis, the court impliedly rejected Dr. Couture's understanding of the basis for Grant's conduct. Dr. Couture viewed Grant as acting within a more normal range of sexual conduct. The probation officer, however, viewed Grant's conduct as predatory and disturbing. In finding that the community needed protection from Grant during attempts to rehabilitate him, the juvenile court found the evidence relied upon by the probation officer as more convincing than that relied upon by Dr. Couture.

Furthermore, the probation officer's evaluation differed from Dr. Couture's diagnosis concerning the amount of counseling Grant required to overcome a long pattern of sexual misconduct. Dr. Couture believed Grant could benefit from the local therapy program available through Mental Health System of Care. The probation officer believed Grant needed intensive therapy not available in local programs and that to be eligible for the programming at the Mental Health System of Care, Grant would have to admit he had a problem. Though Grant admitted one of the allegations against him, he was in denial that he was a sex offender or that he needed therapy. There is substantial evidence in the record supporting the juvenile court's determination that Grant needed more intensive therapy than was locally available.

We review a commitment decision only for abuse of discretion, indulging all reasonable inferences to support the decision of the juvenile court. (*In re Asean D.*, *supra*, 14 Cal.App.4th 467, 473.) Here the record shows that the juvenile court carefully considered less restriction alternatives to a CYA commitment. We find no abuse in the court's exercise of discretion in its order committing Grant to CYA.[7]

DISPOSITION

The judgment of the juvenile court is affirmed.

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[7] Grant's appellate counsel has requested this court take judicial notice of a report on sex offender treatment at CYA by Jerry Thomas, a report generally evaluating conditions at CYA by Dr. Barry Krisberg, and an article from the *San Francisco Chronicle* dated February 10, 2004 which sets forth alleged abuses at CYA.

We note that none of this information was before the juvenile court. Appellant is asking this court to reverse the judgment of the juvenile court based on information completely outside the record. We normally do not take judicial notice of documents, including pleadings, that are not before the trial court. (See *People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1; *People v. Amador* (2000) 24 Cal.4th 387, 394.)

Appellant's request for judicial notice is denied.